AMERICAN ARBITRATION ASSOCIATION
AAA. NO. 01-15-004-7311

NORBERT TUROS and ZSOLT BALLA

Claimants,

vs.

LIQUE MIAMI LOUNGE, LLC, et al.

Respondents.
_____ /

ORDER ON CLAIMANTS' MOTION FOR SUMMARY JUDGMENT, FINDINGS AND FINAL AWARD

This matter is before me pursuant to Claimants' Motion for Final Summary Judgment and Motion to Withdraw from Further Representation of Zsolt Balla dated August 26, 2016 and Respondents' Response to same. Having reviewed the parties' pleadings and other submissions, I make the following Findings and Final Award.

I. FACTS

Claimants brought this action to recover unpaid overtime and minimum wage compensation from LIQUE MIAMI LOUNGE, LLC ("LIQUE") and ALEKSANDR PODOLNY ("PODOLNY"), (collectively referred to as "Employer"), as well as for an additional amount as liquidated damages, costs and reasonable attorney's fees under the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C.§201 et seq. Claimant also brought this action under the Florida Minimum Wage Act ("FMWA") and for liquidated damages based on Respondents' alleged failure to promptly pay wages.

On July 7, 2016, the undersigned entered an Order Granting Claimants' Motion to Deem Certain Facts Established (the "July 7th Order"). Claimants' Motion to Deem was fully briefed by both parties. Pursuant to that Order, the following facts have been established:

1. Claimant TUROS was employed by the Respondents, LIQUE MIAMI LOUNGE, LLC and ALEKSANDR PODOLNY from October 5, 2014 through December 31, 2014. From October 5, 2014 through December 31, 2014, Claimant TUROS worked 60 hours per week. TUROS was never paid for any overtime hours worked.

2. From October 5, 2014 through December 31, 2014, Claimant TUROS was only paid twice, was always paid late and never enough to cover the minimum wage for every hour worked.

3. Claimant BALLA was employed by the Respondents, LIQUE MIAMI LOUNGE, LLC, and ALEKSANDR PODOLNY from November 17, 2014 through January 17, 2015.

4. From November 17, 2014 through January 17, 2015, Claimant BALLA worked 60 hours per week. Claimant BALLA was never paid for any overtime hours worked.

5. From November 17, 2014 through January 17, 2015, Claimant BALLA was only paid twice [wages totaling $1,977.57], was paid late and never enough to cover the minimum wage for every hour worked.

6. Respondent, LIQUE MIAMI, is an enterprise to which the FLSA applies.

7. Turos submitted a sworn statement dated August 23, 2016 stating that he was not paid for overtime, minimum wage, and that his unpaid wages, including liquidated damages, totaled $11,869.67. Respondents have not rebutted that calculation.

8. The Supplemental Damage Calculations submitted on September 14, 2016, by Claimant's attorney reflect that Balla is owed a total of $7,890.03 in unpaid wages, plus liquidated damages, consistent with Balla's claims in the complaint. Respondents have not rebutted that calculation.

9. There is no genuine issue of material fact presented, as all of the relevant facts have been either admitted by the Respondents, are unrebutted or are deemed established by the July 7th Order.

II. SUMMARY JUDGMENT STANDARD

Summary judgment can be granted, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue of fact is material if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. It is genuine if the record as a whole could lead a rational trier of fact to find for the non-moving party. *Allan v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997).

The moving party has the burden of showing the absence of a genuine issue of material fact. In deciding whether this burden is met, the court must view the evidence and all factual inferences in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992).

III. CLAIMS

A. FLSA Overtime Claim

Claimants have the *prima facie* burden of showing as a matter of just and reasonable inference that the wages paid to them did not satisfy the requirements of the FLSA before they filed the complaint. *Donavan v. New Floridian Hotel, Inc.,* 676 F.2d 468, 475 n.12 (11th Cir. 1982). "Although an FLSA plaintiff bears the burden of proving that he or she worked overtime

without compensation, the remedial nature of the statute and the great public policy which it embodies militate against making the burden an impossible hurdle for the employee." It is the employer's duty to keep records of employee's wages, hours, and other conditions and practices of employment. *Id.* Where an employer's time records are incomplete and/or cannot be relied upon, an employee may prove the hours worked as a matter of just and reasonable inference. *Id.* at 1316. "If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Allen v. Board of Public Educ. for Bibb County*, 495 F.3d at 1316 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, (1946)).

Claimants have met their burden to prove that they performed work for which they were not adequately compensated for 60 hours per week. Respondents have not provided sufficient time records to refute Claimants proffered time worked. (*See* the July 7th Order). Because Respondents fail to meet their shifting burden of proof, the Claimants are entitled to damages for their uncompensated regular and overtime hours.

B. <u>FLSA Minimum Wage Claim</u>

The FLSA requires payment of a minimum wage for every hour worked. 29 U.S.C. § 206; F.S. 448.110; *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739, (1981). Claimants bear the initial burden of proving that the wages received were less than the statutory minimum wage. Once they do so, the burden of proof shifts to the employer to prove that Claimants were properly paid. Claimants have provided evidence that they were paid less than the minimum wage during their tenure for certain hours worked (*see* July 7th Order). Respondents have put forth no evidence to negate that fact. Claimants are therefore entitled to damages for Respondents' violation of the minimum wage requirements of the FLSA.

C. Late Payments Claim

The FLSA requires payment to be made, "as soon as after the regular period as practicable." 29 CFR § 778.106 ("Time of Payment"). The Eleventh Circuit, as well as all other jurisdictions, requires prompt payment. *Olson*, 765 F.2d at 1578. The FLSA imposes as a requirement that wages be paid on the date they are due, and failure to do so results in the imposition of liquidated damages. *Biggs v. Wilson*, 1 F.3d 1537, 1539 (9th Cir. 1993). Thus, the obligation to pay liquidated damages immediately arises when an employer fails to pay wages on the payment date.

It has been established that TUROS was employed from October 5, 2014 through December 31, 2014, that BALLA was employed from November 17, 2014 through January 17, 2015, and that both Claimants only received two checks throughout their employment. Respondents have not produced any evidence showing a regularly established pay period. Therefore, Respondents failed to timely pay the Claimants' minimum wages.

D. Claim For Attorneys' Fees and Costs

Claimants' attorney, after the Motion for Summary Judgment was drafted, received an e-mail from Claimant BALLA dated August 12, 2016 which stated, "[p]lease accept this letter as formal notice that I, Zsolt Balla, no longer wish to pursue any claims against Alex Podolny individually and Lique Miami Restaurant and Lounge and will not participate in any related proceedings."

Claimants' attorney argues that after a law suit is filed, Respondents' payment of back wages to either Claimant without the participation of his attorney does not relieve the Respondents from the obligation to pay attorney's fees and costs under the FLSA. He submits that the rule is based on the principle that the payment of the claim is the functional equivalent of

a confession of judgment, thus obligating the Defendant/Respondent to pay attorney's fees and costs, *citing Brown v. Vermont Mutual Insurance Company*, 614 So.2d 574, 579 (Fla. 1st DCA 1993) which held:

> Although the parties to a lawsuit that are represented by attorneys may settle the dispute between themselves without the participation of their attorney, **any such settlement made without knowledge of or notice to a party's attorney and without payment of the attorney's fee due such attorney, operates as a fraud upon the attorney, whether intended or not, and the attorney may continue the litigation in the name of the parties to enforce the right to be paid a fee** in those instances where the attorney has asserted a claim or charging lien for such fees before the lawsuit has been reduced to judgment or dismissed pursuant to settlement."

Claimants counsel further cites the Third District Court of Appeals, which held that when a claim is litigated, then paid by a defendant, such payment entitles the plaintiff to a judgment which provides a basis for an award of attorney's fees and costs. *Avila v. Latin Am. Prop. & Cas. Ins. Co.*, 548 So. 2d 894, 895 (Fla. 3d DCA 1989). The U.S. Supreme Court also holds that a party is a "prevailing party" when he is awarded some relief, regardless of the amount. *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 603 (2001).

Claimants' attorney has requested that the Arbitrator grant his Motion for Summary Judgment and declare Claimants the prevailing parties. Such prevailing party determination and entry of judgment triggers entitlement to attorney's fees and costs under the FLSA, which makes it mandatory to award attorney's fees to a prevailing Plaintiff. 29 C.F.R. § 216(b). Claimants' attorney asserts that after the July 7th Order issued, Respondents called and sent text messages to the Claimants in an attempt to settle their claims without his participation.

TUROS has submitted a sworn statement dated August 23, 2016, evidencing that to his knowledge and belief, Respondents reached a settlement with his co-claimant, BALLA, which

settlement excluded Claimants' counsel. More recently, Turos has requested that he withdraw his claims, without the participation of his counsel. The Claimants' attorney avers that he has advanced costs and incurred attorney's fees in the prosecution of this action, and has filed a Notice of Lien seeking payment for same.

IV. *LYNN'S FOOD STORES, INC. v. U.S.* — MANDATORY COURT REVIEW OF ANY SETTLEMENT OF FLSA CLAIMS

Respondents argue that there is no longer a case or controversy inasmuch as first Balla, and more recently Turos, have attempted to withdraw their claims after the Summary Judgment Motion was filed on their behalf. Respondents therefore submit that this matter must be summarily dismissed.

However, I find that this case is controlled by *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350 (11 Cir.1982). That case holds that there are only two ways to settle or compromise FLSA claims either under the supervision of the U.S. Department of Labor (DOL) pursuant to 29 U.S.C. § 216(c) **or** through a private action (as here) under § 216(b) **where any settlement must be approved by the court**. Accordingly, Claimants may not compromise their claims without court oversight and have no right to automatic withdrawal of such claims without court review.

In this case, Turos and Balla filed a complaint against Lique Miami Lounge, LLC and Aleksandr Podolny under the FLSA. In Turos sworn statement he stated that post-complaint he was offered a settlement of this case if he agreed to exclude his attorney from the settlement, but he initially refused. (Apparently, he more recently agreed to same and asked not to pursue his FLSA claims.) Turos further testified that Balla received a settlement payment from Respondents.

In *Nall v. Mal-Motels, Inc.*, 723 F.3d.1304, No. 12-13528, 2013 WL 3871011 (11th Cir. 2013), the court held that *Lynn's Food* applies and addressed the meaning of a "stipulated judgment" approving a settlement. The plaintiff in *Nall* had signed a settlement agreement that the employer later sought to enforce. *Nall* subsequently hired counsel, and at the fairness hearing the attorney argued against the settlement as unfair and unreasonable but the lower court entered judgment anyway. In a question of first impression for the Eleventh Circuit, the court said that it (obviously) takes two or more to stipulate, and a judgment to which on side objects is not stipulated. **Because *Nall's* attorney objected to the settlement, the court of appeals held that the judgment was not stipulated** and therefore the lower court decision approving it was vacated.

While specific factors and analysis vary from case to case, courts reviewing FLSA settlements generally apply a multifactor test to determine whether an FLSA settlement is a fair and reasonable resolution of a bona fide dispute. Such factors often track Rule 23 fairness factors and may include the stage of the proceedings; status of discovery; complexity and likely duration of the litigation; fraud or collusion in the settlement; representation of counsel; and amount of the settlement relative to potential recovery.

Inasmuch as Balla and/or Turos appear to have been paid at least part of their unpaid wages under the FLSA, and such payments were post-complaint, such wage payments fall under the category of "**settlement**" and must be reviewed and approved by the court (here, the AAA arbitrator) pursuant to the *Lynn's Food* requirements for fairness and reasonability.

In this case, the parties have not presented any stipulated or agreed settlement for judicial review and approval. The Respondents may not avoid the *Lynn's Food* mandate by a private settlement for unknown and unreviewed amounts which exclude the attorney's fees mandated by

the FLSA. Given that there has been no court-approved settlement of the Claimants' FLSA claims, I must proceed to rule upon Claimants' Summary Judgment Motion.

V. FINDINGS AND AWARD

WHEREFORE, the undersigned makes the following findings:

1. GRANTS Claimants' Motion for Summary Judgment.

2. FINDS that Claimants are the prevailing parties and entitled to judgment against the Respondents LIQUE and PODOLNY for overtime and minimum wage violations of the FLSA and the FMWA, and that they are owed back wages, including liquidated damages.

3. FINDS that Claimants' attorney, Eddy O. Marban, Esq., is entitled to be paid by Respondents, jointly and severally, reasonable attorneys fees and costs in prosecuting this action on behalf of **both Claimants**. Claimants' attorney is directed to forward his reasonable attorneys' fees and costs request (with billing records) to Respondents' attorney **within seven (7) calendar days**. Respondents are directed to pay said sum to Mr. Marban **within five (5) business days** following receipt of the total fees and costs incurred by Claimants.

4. FINDS the following unpaid wages are due and owing to each Claimant[1] by Respondents, jointly and severally, **within five (5) business days** following Respondents' attorneys receipt of this Order, Findings, and Award:

A. **BALLA:**

In his discovery responses, BALLA refers to Paragraph 16, 25, and 33 of the Complaint for his damages for unpaid overtime, minimum wages, and liquidated damages. **Balla's unpaid wages, including liquidated damages, total $7,890.03.**

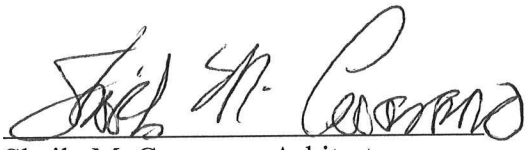
[1] Should either BALLA or TUROS have received all or partial payment of their damages previously from Respondents, then such amount shall be deducted from, and offset against, the amount due either Claimant under this Order.

B. **TUROS:**

According to his sworn statement, Turo's unpaid wages, including liquidated damages, total $11,869.67.

5. GRANTS Counsel's Motion to Withdraw from further representation as to Claimant Zsolt Balla, except as to receipt of attorneys' fees and costs under this Order.

This Order on Claimants' Motion for Summary Judgment, Findings and Final Award is issued this 4th day of October, 2016.



Sheila M. Cesarano, Arbitrator